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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Communication No. 12/2013

Decision adopted by the Committee at its thirteenth session (25 March–17 April 2015)

Submitted by:	A. M. (represented by the Australian Centre for Disability Law)
Alleged victim:	The author
State Party:	Australia
Date of communication:	18 April 2013 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 7 June 2013 (not issued in document form)
Date of adoption of the decision:	27 March 2015
Procedural issues:	Lack of victim status.
Subject matter:	Equal recognition before the law; access to justice; freedom of expression and opinion; access to information; participation in public life.
Substantive issues:	Equality and non-discrimination; equal recognition before the law; freedom of expression; participation in public life.
Articles of the Convention:	12, 13, 21 and 29.
Articles of the Optional Protocol:	1 (1) and 2 (d).

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Annex

Decision of the Committee on the Rights of Persons with Disabilities (thirteenth session)

concerning

Communication No. 12/2013[1]

Submitted by:	A. M. (represented by the Australian Centre for Disability Law)
Alleged victim:	The author
State Party:	Australia
Date of communication:	18 April 2013 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 27 March 2015,

Having concluded its consideration of communication No. 12/2013, submitted to the Committee on the Rights of Persons with Disabilities on behalf of A. M. under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Decision under article 2 of the Optional Protocol

1.1 The author of the communication is A. M., an Australian citizen born in 1970. He claims to be the victim of a violation by Australia of articles 12, 13, 21 and 29 of the Convention. He is represented by the Australian Centre for Disability Law. The Convention and the Optional Protocol entered into force for the State party on 17 August 2008 and on 19 September 2009 respectively.

1.2 On 11 February 2014, pursuant to rule 70 (8) of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided that the admissibility of the communication should be examined separately from the merits.

[1] The following members of the Committee participated in the examination of the present communication: Mohammed Al-Tarawneh, Danlami Umaru Basharu, Monthian Buntan, María Soledad Cisternas Reyes, Theresia Degener, Kim Hyung Shik, Stig Langvad, Laszló Gábor Lovászy, Diane Kingston, Martin Mwesigwa Babu, Carlos Alberto Parra Dussan, Safak Pavey, Ana Peláez Narváez, Coomaravel Pyaneandee, Silvia Judith Quan-Chang, Jonas Ruskus, Damjan Tatić and You Liang.

Facts as presented by the author

2.1 The author is deaf and requires Australian Sign Language (Auslan) interpreting to communicate with others. Since 2002 or before, he has been engaged as an activist in efforts on behalf of the deaf community to persuade the Sheriff and the Government of New South Wales to reconsider the position of the latter on the exclusion of deaf persons who require Auslan interpreting from serving as jurors. He has pursued these efforts on his own behalf and on behalf of a number of organizations and advisory committees.

2.2 Pursuant to the Parliamentary Electorates and Elections Act 1912 of New South Wales, the author is enrolled as an elector for the Legislative Assembly of New South Wales. In compliance with section 5 of the New South Wales Jury Act 1977 (the Jury Act), he is therefore qualified and liable to perform jury duty in New South Wales, where jurors are selected and empanelled by the Sheriff. The Sheriff is a statutory officer of the New South Wales Department of Attorney-General and Justice.[2]

2.3 According to section 14 (D) of the Jury Amendment Act 2010, "the Sheriff is to amend a supplementary roll or jury roll by deleting the name and particulars of a person if…the person has claimed exemption in accordance with this Act and has been exempted from jury service". The author argues that the Sheriff of New South Wales systematically considers that deaf persons who would require Auslan interpreting of courtroom proceedings and jury deliberations have "good cause" for being exempted from performing jury duty on account of their disability, even when the persons themselves do not request such an exemption.[3] Under sub-section 14A (b) of the Jury Act a person has good cause to be exempted from performing jury duty if "some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror."

2.4 The author has never been personally selected to perform jury duties but he considers that the practice of the Sheriff of excluding deaf persons from jury duty is discriminatory, and would affect him should he be randomly selected to perform jury duty. On 18 April 2012, the author filed a complaint on his own behalf and on behalf of other deaf persons before the Australian Human Rights Commission. In that complaint, he alleged that the State of New South Wales had engaged in unlawful discrimination contrary to the Disability Discrimination Act 1992 against him and other persons who are deaf and communicate via Auslan by excluding them from performing jury duty.

2.5 On 22 June 2012, the Australian Human Rights Commission inquired about the author's complaint to the Director General of the New South Wales Department of Attorney-General and Justice (Director General), the entity to which the Sheriff is attached. On 3 August 2012, the Director General informed the Commission that the question of whether people who are "profoundly deaf or have a significant hearing impairment can serve as jurors requires a balancing of complex issues, as the rights of individuals with a disability to participate in the justice system must be weighed against the important rights of the accused to a fair trial and the need to maintain an efficient and effective jury system". Accordingly, a person's eligibility to serve as a juror is a matter for consideration on a-case-by case basis, depending on the particular circumstances of the trial, including the nature of the evidence to be presented and the sensory issues arising.

[2] As set out in the Jury Act 1977 and the Jury Amendment Act 2010, the Office of the Sheriff has the duty to provide administrative and management services to jurors.

[3] According to schedule 2 (12) of the Jury Act 1977, ineligible refers to "persons who are unable because of sickness, infirmity or disability, to discharge the duties of a juror".

2.6 The Director General further explained that those randomly selected from the Electoral Roll receive a Notice of Inclusion advising that their name has been selected and included on the Jury Roll. At that stage, a person can contact the Sheriff's Office and ask to be excluded from the Roll. When a person who receives a summons to attend jury duty has a disability requiring specific accommodation, he/she is asked to contact the Office of the Sheriff, who can assess whether the requested accommodation can be arranged in the courthouse. The Director General further noted that the author had never been randomly selected and, therefore, had not been discriminated against.

2.7 The Director General also noted that section 48 of the Jury Act prevents the use of real-time captioning by members of the jury during jury room deliberations, as it would introduce a non-juror, who has not been summoned and selected through a random ballot process. [4]The Director General further argues that real-time captioning technology is very resource-intensive and only one trial at a time using that technology could be supported within existing court resources. Therefore, accommodation can only be provided through the use of infrared hearing systems, which provide clear enhanced audio for persons using hearing receivers. That system is available in all courts across the State, with the system permanently located in all metropolitan courts, and portable kits available for set-up in smaller regional locations. Where a person does not have a receiver or cannot use their own receiver, arrangements can be made for a receiver to be made available upon request.

2.8 The author submits that the Director General's assumptions regarding the capacity of deaf persons requiring Auslan interpretation to perform jury duties are presumably based upon the reasons given by the New South Wales Government for rejecting the Law Reform Commission's recommendation 1 (e), which proposed that sign language interpreters and stenographers be allowed to assist deaf jurors in the court and jury deliberations.[5]

2.9 After an unsuccessful conciliation conference held between the author and the Director General on 23 November 2012, the Australian Human Rights Commission terminated the author's complaint on 27 November 2012 on the basis that there was no reasonable prospect of conciliation between the parties. The Commission informed the author that he may apply to the Federal Court of Australia or the Federal Magistrates Court, alleging unlawful discrimination by the New South Wales Department of Attorney-General and Justice.

2.10 The author considers that, through his complaint to the Australian Human Rights Commission, he has exhausted all reasonably available remedies. He first argues that the Disability Discrimination Act 1992 prohibits discrimination on the basis of disability in the administration of Commonwealth laws and programmes. However, the Jury Act 1977, under which the Sheriff performs his functions, is a New South Wales law. In addition, the Disability Discrimination Act and the New South Wales Anti-Discrimination Act 1977 do not provide for prohibition of discrimination on the basis of disability in the administration of State laws and programmes.[6] Should the author want to

[4] The selection process requirements for jurors in criminal proceedings are set out in section 48 of the Jury Act 1977, which provides that the persons sworn in following the selection process shall constitute the jury for the trial. It makes a reference to section 55G, which provides that the verdict jury is to be constituted by 12 members.

[5] New South Wales Law Reform Commission, "Report 114: Blind or Deaf Jurors", September 2006.

[6] Disability Discrimination Act 1992, arts. 23–29: the scope of the protection extends to: employment, education, access to premises, the provision of goods, services and facilities, accommodation, land, clubs and associations, and administration of Commonwealth laws and programmes; New South Wales Anti-Discrimination Act 1977, arts. 49D to 49O: the scope of the protection extends to:

bring an application to the Federal Court or the Federal Magistrates Court, he would have to demonstrate to jurors that the functions of the Office of the Sheriff should be interpreted as "the provision of services and facilities", so that they fall under the scope of the Disability Discrimination Act[7] or the New South Wales Anti-Discrimination Act.[8] The author adds that there is no case law on the matter in the State party.

2.11 The author further argues that there is a "significant risk" that the Court will find that his case does not fall within the scope of the Disability Discrimination Act or the New South Wales Anti-Discrimination Act. He indicates that the Commonwealth disability non-discrimination law in Australia and the Anti-Discrimination Act 1977 of New South Wales incorporate prohibitions on discrimination on the basis of disability in specified areas of public life subject to exceptions. Jury duty is a public duty or obligation, and public duties or obligations are not protected areas of public life under either the Disability Discrimination Act or the New South Wales Anti-Discrimination Act.

2.12 Thirdly, the author considers that there is a risk that the Court will find that he lacks sufficient standing to bring a claim, and that he should not be regarded as "affected" by a purported act of discrimination. The author claims that the term "affected person" has been narrowly interpreted in case law under the Disability Discrimination Act.[9] Finally, the author argues that if he were to pursue his claim before the Court and fail, he would be liable to pay adverse costs. He considers that such a financial risk is too high and renders domestic remedies not reasonably available to him.

The complaint

3.1 The author alleges that the State Party has violated his rights under articles 12, 13, 21 and 29 of the Convention on the Rights of Persons with Disabilities.

3.2 He claims that the domestic authorities' refusal to permit Auslan interpreting of courtroom proceedings and jury deliberations to enable him to participate in jury duty, should he be selected to do so, constitutes a violation of his right to enjoy legal capacity on an equal basis with others, as guaranteed under article 12 (2) of the Convention. The author considers that the performance of jury duty is a fundamental aspect of the legal capacity of adult citizens. He further considers that the Director-General's statement directly implies that deaf persons are inherently unable to sufficiently comprehend the legal process, and that their participation would violate the right of the accused person to a fair trial. The author considers that such a position amounts to a violation of his right to enjoy legal capacity on an equal basis with others in all aspects of life. In addition, the author considers that the refusal of the Director General and the Sheriff to permit Auslan interpreting of courtroom proceedings and jury deliberations to enable his participation in jury duty on an equal basis with others constitutes a violation (a) of his right to access to the support he requires to exercise his legal capacity to perform jury duty in compliance with article 12 (3) of the Convention; (b) of his right to non-discrimination in

employment, education, the provision of goods and services, accommodation and registered clubs.

[7] The Disability Discrimination Act 1992, in article 24, provides that "it is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability".

[8] The New South Wales Anti-Discrimination Act 1977, in article 49M, provides that "it is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of disability… [unless] the provision of the goods or services would impose unjustifiable hardship on the person who provides the goods or services".

[9] In particular, the term "affected person" has been held not to encompass representative proceedings in *Access for All Alliance (Hervey Bay) Inc v. Hervey Bay City Council [2007] FCA 615*.

the enjoyment of legal capacity as enshrined in articles 5 and 12 of the Convention; and (c) of his freedom to seek, receive and impart information and ideas on an equal basis with others through a form of communication of his choice, as enshrined in article 21 of the Convention.

3.3 With regard to the alleged violation of article 13 of the Covenant, the author claims that the domestic authorities' refusal to permit Auslan interpreting of courtroom proceedings and jury deliberations to enable him to participate in jury duty, should he be selected to do so, constitutes a violation of his right to effective access to justice. He considers that the participation of jurors in the legal system should be understood as a component of the right to effectively access justice on an equal basis with others.

3.4 The author also considers that Auslan interpretation should be seen as a "form of communication" of the person's choice and an "official interaction" within the meaning of article 21 of the Convention. By letter dated 3 August 2012 to the Australian Human Rights Commission, the Director General stated that the only form of "communication" that could be accommodated to enable persons with hearing impairment to perform jury duty was hearing induction. The author argues that this option is of no benefit to him as he is profoundly deaf and unable to hear spoken language by means of hearing induction. Given that jury duty is a mandatory civic obligation performed on behalf of the State in the administration of justice, the author considers that the refusal by the State party to provide Auslan interpretation of courtroom proceedings and jury deliberations to eligible jurors who are deaf and who need Auslan interpretation amounts to a violation of article 21 of the Convention.

3.5 Finally, the author claims that there has been a violation of his rights under article 29 of the Convention. He considers that the refusal of the Director General and the Sheriff to permit Auslan interpretation of courtroom proceedings and jury deliberations amounts to a violation of his right (a) to enjoy political rights, i.e. his right to participate in the conduct of public affairs and the right to have access to public service, on an equal basis with others; and (b) to non-discrimination in the enjoyment of his political rights, i.e. his right to participate in the conduct of public affairs and the right to have access to public services.

State party's observations on the admissibility

4.1 On 11 October 2013, the State party requested the Committee to consider the admissibility of the communication separately from the merits, pursuant to rule 70 (5) of the Committee's rules of procedure.

4.2 The State party indicates that the Jury Act 1977 governs the jury selection process in New South Wales, in which it is set out in section 5 that "subject to this Act, every person who is enrolled as an elector for the Legislative Assembly of New South Wales pursuant to the Parliamentary Electorates and Elections Act 1912 is qualified and liable to serve as a juror". The State party recalls that the author lodged a complaint to the Australian Human Rights Commission, alleging discrimination against him and other persons who are deaf and communicate using Auslan, and seeking a general remedy.[10] In its response to the author's complaint, the New South Wales Department of the Attorney

[10] The author claimed the following remedies: "law and policy change which will enable persons who are deaf to perform jury service on an equal basis with others" and "an undertaking by the sheriff of New South Wales to train his staff and agents in equality law and practice in relation to persons with disability".

General and Justice stated that the author "has not been randomly selected, accordingly the claim that he has been discriminated against is denied".[11]

4.3 The State party considers that the author's allegations do not establish that he is the victim of a violation of the provisions of the Convention. It considers that article 1 (1) of the Optional Protocol requires that a person in fact be the victim of a violation; that it will not suffice that a person may be theoretically or hypothetically affected by a measure; and that *actio popularis* does not fall within the scope of article 1 (1) of the Optional Protocol. The State party refers to the jurisprudence of the Human Rights Committee, under which the victim requirement contained in the Optional Protocol extends beyond situations where a person has in fact been affected by an act or omission and a violation has actually taken place to situations where there is an imminent prospect or real threat of a violation occurring.[12] The State party however considers that this jurisprudence does not extend to events that are hypothetical only.

4.4 The State party further notes that the Human Rights Committee has in some circumstances considered the victim requirement in the Optional Protocol to be met by legislation in force that has not yet been specifically enforced against a particular individual. Such cases have concerned legislation that, if applied, would have a punitive or privative effect. In the present communication, the author claims to be the victim of violations by Australia of certain provisions of the Convention, considering that, but for his hearing impairment, he is "qualified and liable to perform jury duty". The State party does not dispute the author's assertion that he is enrolled as an elector for the Legislative Assembly of New South Wales pursuant to the Parliamentary Electorates and Elections Act 1912, and that he is therefore qualified and liable to perform jury duty pursuant to section 5 of the Jury Act. However, the State party considers that this does not in itself establish the status of an individual as the victim of a violation insofar as the author has not been involved in any stage of the jury selection process and the facts do not disclose an imminent prospect of the author's being affected by a decision to involuntarily exempt him from performing jury duty, or of the author's being summoned or engaged in compliance with the provisions of the Jury Act. The author is no more likely to be summoned than any other individual, there is little likelihood that this will occur; and the author has not been excluded in any way from performing jury duty under the provisions of the Jury Act and of the Parliamentary Electorates and Elections Act. Nor does the State party consider that the facts referred to in the present communication disclose any relevant conduct on the part of the State party in relation to the author that occurred after the entry into force of the Convention in Australia, on 19 September 2009. It therefore considers that the communication concerns events that are hypothetical only, and that the author cannot be considered as a victim under any of the legislation to which reference is made.

4.5 The State party further refers to the author's argument that his status as a victim is also supported by the fact that he has had extensive involvement in law reform activities, seeking to enable persons who are deaf to perform jury duty with the adjustments they require. The State party does not consider that this involvement gives rise to the status for the author as a victim of any particular violation.

[11] The State party refers to the letter dated 3 August 2012 of the Director General of the New South Wales Department of Attorney-General and Justice.

[12] The State party refers to Human Rights Committee communications No. 429/1990, *E.W. et al. v. the Netherlands*, decision on admissibility of 8 April 1993, para. 6.4; and No. 645/1995, *Bordes and Temeharo v. France*, decision on admissibility of 22 July 1996, para. 5.4.

4.6 The State party also considers that the complaint lodged by the author with the Australian Human Rights Commission with regard to the exclusion by the Sheriff from jury duty of deaf persons who require Auslan interpretation does not confer on him the status of victim insofar as that complaint was also hypothetical in nature. Finally, while recognizing that the author falls within the scope of the term "persons with disabilities", it considers that this is not sufficient for him to qualify as a victim.

4.7 The State party additionally submits that the communication should be held inadmissible on the grounds of non-exhaustion of domestic remedies insofar as the author did not take any proceedings after the complaint was presented to the Australian Human Rights Commission, the purpose of which was to engage the parties in a conciliatory process. The termination of the complaint process by the Commission gave rise to a further avenue for remedy for the author, as he was entitled to apply to the Federal Court or the Federal Circuit Court within 60 days.[13] The author did not pursue that avenue or any judicial remedy before the federal courts, and did not question in any part of his communication the timeliness or effectiveness of the remedies available. The State party further refers to the jurisprudence of the Human Rights Committee, according to which the lack of financial means does not absolve an author of the requirement to exhaust all available domestic remedies under article 2 (d) of the Optional Protocol.[14] The author has not brought his complaint before any court in Australia and the author's circumstances and any possible cost of bringing his complaint before a court for determination do not meet the requirements of article 2 (d).

4.8 The State party therefore considers that the author's communication should be held inadmissible under articles 1 (1) and 2 (d) of the Optional Protocol.

The author's comments on the State party's observations

5.1 On 24 January 2014, the author submitted his comments on admissibility to the Committee. Reiterating some of the arguments of his initial communication, the author considers that the objections of the State party to the admissibility of the case are misconceived. He argues that, as an Australian citizen enrolled as an elector for the Legislative Assembly of New South Wales pursuant to the Parliamentary Electorates and Elections Act 1912, he is both qualified and liable to serve as a juror pursuant to section 5 of the Jury Act. He is therefore subject to a legal obligation to perform jury duty if and when summoned to do so.

5.2 The State of New South Wales, through its Sheriff, refuses to permit persons who are deaf and require Auslan interpretation who are eligible and liable for jury duty to serve on juries in that State. While recalling the content of the letter of the Director General to the Australian Human Rights Commission dated 3 August 2012,[15] the author informs the Committee that, in December 2013, the State of New South Wales provided an update on its response to the New South Wales Law Reform Commission, indicating that its position had not changed from that announced in June 2010, and that it continued to refuse to permit persons who are deaf who require live assistance to participate as jurors in courtroom proceedings and jury deliberations. The author further argues that all those facts existed on the date of his communication and after the entry into force of the Optional Protocol for Australia.

[13] See Australian Human Rights Commission Act 1986, section 46 PO (2).

[14] See Human Rights communication No. 397/1990, *P.S. v. Denmark*, decision on admissibility of 22 July 1992, para. 5.4.

[15] Ibid., paras. 2.4 and 3.4.

5.3 The author argues that jury duty represents the solemn responsibility of the citizen to participate in the public administration of justice, and that the exclusion of deaf persons who communicate using Auslan represents an assault upon their status as citizens and upon their equality with others.

5.4 The author further informs the Committee that, in the course of the New South Wales Law Reform Commission's Inquiry into Deaf or Blind Jurors, the capacity of deaf persons to serve as jurors was "canvassed across the board". Similarly, the reply of the New South Wales government to the Law Reform Commission's report rejecting the recommendation that deaf persons who require Auslan be permitted to serve as jurors on the basis that they are incompetent and incapable of doing so, has been widely communicated, including among stakeholder groups in the legal system. The author argues that this has had a serious negative impact on the perception of the competence and capability of deaf persons.

5.5 The author considers that he is no less a victim of the alleged violation merely because he has not yet been summoned to perform jury duty: he is subject to a continuing disqualification to participate in jury duty on the basis of his disability and his requirement for a reasonable adjustment, i.e. Auslan interpretation. The fact that this disqualification also applies to other deaf persons who use Auslan as their means of communication does not diminish the personal impact of the violation on the author: he is subject to a present legal obligation to perform jury duty. If summoned, he will necessarily be refused access to Auslan interpretation and involuntarily disqualified from performing jury duty. This could occur at any time, and against any member of the group to which the author belongs. The author considers that his allegations disclose a present, actual assault on his dignity and human rights (i.e. his diminished status as a citizen and the unjustified attribution to him of characteristics of incompetence and incapacity). He also argues that the pervasive impact of the continued existence of this policy and public opinion have affected him and continue to affect him personally. The author therefore considers that his communication should be held admissible in accordance with the principles established in *E.W. et al. v. the Netherlands* and *Temeharo v. France*. [16]

5.6 The author argues that neither the Disability Discrimination Act 1993 nor the Anti-Discrimination Act 1977 prohibit discrimination in relation to the performance of public duties, such as jury duty. Consequently, the author considers that he has no cause of action and no remedy under either statute, and that he has therefore exhausted all available domestic remedies.

5.7 The author further informs the Committee that he was advised by his legal representative that he ought not to pursue his complaint before the Australian Human Rights Commission by bringing the matter to a Federal Court as it would almost certainly fail, either on the basis that his allegations do not concern an area of life in which discrimination on the basis of disability is prohibited, or because the Court would determine that he does not have sufficient standing to maintain such a claim. The author argues that this assessment is not questioned by the State party, and that it is supported by the jurisprudence of the Queensland Civil and Administrative Tribunal.[17] In the case of *Lyons v. State of Queensland*, the author claimed direct and indirect discrimination for the exclusion from jury service of a deaf person who required Auslan interpreting. That claim related to "administration of State laws and programs", which is an area of life in

[16] See Human Rights Committee communications No. 429/1990, *E.W. et al. v. The Netherlands*, decision on admissibility of 8 April 1993, para. 6.4; and No. 645/1995, *Bordes and Temeharo v. France* (see footnote 13), paras. 5.4– 5.5.

[17] See *Lyons v. State of Queensland* (No 2) [2013], QCAT 731, 11 December 2013.

which the impairment discrimination is prohibited under the Anti-Discrimination Act of Queensland, but not under the Disability Discrimination Act 1993 or the Anti-Discrimination Act of New South Wales. That case also included the contention that the Sheriff was engaged in the provision of "services and facilities" when selecting and empanelling jurors. The Tribunal dismissed the claim of direct and indirect discrimination in relation to the administration of State laws and programmes. Concerning the claim of direct discrimination, it found no causal link between the complainant's protected status as a deaf person and her exclusion from jury service. The Tribunal considered that she was not treated less favourably than the relevant comparator. In relation to the indirect discrimination claim, the Tribunal found that the complainant was not required to comply with requirements or conditions with which she was unable to comply because of her impairment and which disadvantaged her.

5.8 The author notes that the Tribunal did not find it necessary to determine whether the Sheriff was engaged in the provision of services and facilities when selecting and empanelling jurors. He considers that the result would be the same even if this area of life was found to be concerned. In such circumstances, even in the most unlikely event of the Federal Court determining that the activities of the Sheriff in the selection and empanelling of jurors fall within the services and facilities protected under the Disability Discrimination Act, his claim would fail on grounds of causation with regard to the claim of indirect discrimination and in the identification of an impermissible requirement or condition in indirect discrimination. The author further argues that Australian legal practitioners bear a duty under section 345 of the Legal Profession Act 2004 not to commence or maintain a civil claim that does not have reasonable prospects of success.[18] Should a legal practitioner commence and maintain such a claim, he/she would be liable to have the costs of the litigation awarded against him/her and be found guilty of unsatisfactory professional conduct or professional misconduct. In such circumstances, his/her entitlement to continue legal practice may be suspended or revoked.[19] The author therefore considers that the Committee should reject the contention of the State party, inviting the author to pursue a cause of action which does not have any prospect of success and which would expose him and his legal adviser to adverse costs and to a potential claim of professional misconduct for his lawyer. The author considers that the requirement of article 2 (d) of the Optional Protocol under which the author must have exhausted all available domestic remedies should be limited to causes of action that have a reasonable prospect of success.

State party's further observations

6.1 On 1 May 2014, the State party submitted further observations on the admissibility of the communication, noting that its observations are not exhaustive and that any comment submitted by the author and not addressed by the State party should not be considered as having been agreed to.

6.2 The State party reiterates that the present communication should be held inadmissible pursuant to article 1 (1) of the Optional Protocol as the author has failed to demonstrate that he is a victim of any violation of the Convention. The State party observes that the author alleges a "present, actual assault" on his dignity and human

[18] See Legal Profession Act 2004, Section 345 : " (1) A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success".

[19] See section 348 and chapter 4 of the Legal Profession Act.

rights, in particular by the policy and actions of the New South Wales authorities with regard to deaf persons wishing to perform jury duties.

6.3 The State party contests the author's description of the actions of the Sheriff and the New South Wales Government but considers that it is not appropriate to address this question at the admissibility stage. Rather, it reiterates that, in order to qualify as a victim, an individual must in fact be affected by a relevant legal provision or action. The State party considers that the author has not demonstrated a connection between any specific act or omission and a violation of his rights under articles 12, 13, 21 and 29 of the Convention. In particular, a possible perception by others of incompetence or incapacity with respect to the performance of jury duty (and more generally) does not fall within the scope of those articles and does not render the author a victim. Furthermore, the author's status as an Australian citizen and his equality with others are not affected by the actions alleged. While jury duty is to be performed by citizens, and juries may be considered as representative of the community, the set of requirements for undertaking jury duty in New South Wales does not affect in any way the citizenship of the individuals concerned , or their right to participate in public and political life.

6.4 The State party further notes the author's claim that, as a member of the group of deaf persons requiring Auslan, he is under imminent threat since the ordinary operation of the Jury Act 1977 (New South Wales) renders him liable at any point to be required to perform jury duty, and that the policy of the state of New South Wales automatically excludes him from that "present legal obligation". The State party reiterates that, in order to satisfy the test of being the victim of a violation, there must at least be an imminent prospect or a real threat of a violation occurring, and that this must be specific to the individual. The State party further refers to the Human Rights Committee's jurisprudence, considering that it clearly indicates that this standard is not easily met.[20]

6.5 Furthermore, the State party argues that the concept of being "liable" and of "liability" may refer to either a present or prospective legal responsibility, duty or obligation. Within the context of the Jury Act and the process that the Act sets out for the selection of the individuals who will undertake the responsibility of performing jury duty, it is clear that liability for jury duty in section 5 of the Act refers to a future, rather than a current, legal responsibility, duty or obligation. The ordinary operation of the Jury Act, the provisions of which have not in any specific way been applied to the author, does not meet the criteria for an imminent prospect or real threat.

6.6 The State party also submits that where legislation renders an individual's activities unlawful, or where legislation is of a type that may be enforced against an individual, the victim requirement may also be met. Laws without a criminal, regulatory or enforcement effect, such as the Jury Act, do not meet this requirement.

Author's further comments

7.1 On 17 June 2014, the author submitted further comments, contesting the State party's arguments.

7.2 The author notes that the State party does not contest that the author is qualified and liable to serve as a juror. The author argues that he is subject to a continuing statutory obligation which he may be required to perform at any time. Although the performance of the obligation might reasonably be described as contingent or prospective, the obligation itself exists at all times.

[20] See communications No.645/1995, *Bordes and Temeharo v. France* (see footnote 13), paras. 5.4–5.6; and No. 429/1990, *E.W. v. The Netherlands* (see footnote 19), para. 6.4.

7.3 The statutory obligation to serve as a juror if summoned to do so is imposed upon the author, while the policy of the Sheriff of New South Wales prevents deaf persons such as the author from fulfilling that obligation, as they require Auslan interpretation of court room proceedings and jury deliberations. It is therefore clear that the author is directly and personally affected by the provisions of the Jury Act and the policy of the Sheriff with respect to deaf persons and jury duty.

7.4 The author further notes the State party's argument that the Jury Act is not a law with a "criminal, regulatory or enforcement effect", and that the "victim requirement" cannot be met on that basis. The author refers to part 9 of the Jury Act, in which a series of offences is set out related to non-compliance with the obligations imposed on individuals and corporations under that Act. He notes that, as a person qualified and liable to perform jury duty, he is potentially exposed to enforcement action by the Sheriff in relation to a number of those offences.

7.5 The author submits that, pursuant to sections 61 and 66 of the Jury Act, he is potentially exposed to a penalty of up to 5 penalty points ($A 550) if he fails to return the prospective juror questionnaire within the time allowed or if he returns the questionnaire without complete answers. An "incomplete answer" as perceived by the Sheriff of New South Wales may include an alleged failure of the author to disclose his supposed ineligibility for jury duty owing to his deafness and his need for Auslan interpretation of courtroom proceedings and jury deliberations. Such a situation may arise because the author does not consider himself ineligible to serve as a juror.

7.6 Further, pursuant to section 62A of the Jury Act, the author is potentially exposed to a penalty of up to 10 penalty points ($A 1,100) if he fails to inform the Sheriff of New South Wales of his supposed ineligibility to serve as a juror owing to his deafness and need for Auslan interpretation of courtroom proceedings and jury deliberations prior to the day his attendance is required at a court or coronial inquest. Again, such a situation may arise because the author does not consider himself ineligible to serve as a juror.

7.7 Finally, pursuant to sections 63, 64 and 66 of the Jury Act, the author is potentially exposed to a penalty of up to 20 penalty points ($A 2,200) if he were to fail to answer a summons for jury service. Such a situation might arise, for example, if the author were to request, but be refused, access to Auslan interpreters in order to participate in the jury selection process, and if he were not to attend the court on that basis. On several occasions in New South Wales, deaf persons who have been summoned for jury duty but who have been refused disability-related adjustments by the Sheriff's officers have later been issued with a penalty notice in relation to their failure to attend the court in answer to their summons, even though they could not have communicated with anyone had they done so.

7.8 The author further notes that the State party also makes a number of contentions with respect to the merit of the present communication. Those submissions relate to the scope and content of articles 12, 13, 21 and 29 of the Convention and the persuasiveness of the author's claims under those provisions. The author considers that these are matters to be considered by the Committee during the examination of the merits of the communication.

7.9 In further support of his argument that he has exhausted all available domestic remedies, the author refers to a decision of the Supreme Court of Queensland of 14 May 2014. In that case, a Queensland Supreme Court judge excluded an unnamed deaf person from performing jury service because she required Auslan interpretation of jury room deliberations. The Court held that the Queensland Jury Act would not permit an Auslan interpreter to be present in the jury room and that, without an Auslan interpreter, the prospective juror was "incapable of effectively performing the functions of a juror and therefore ineligible for jury service."

7.10 The author considers that the reasoning of the Queensland Supreme Court would apply, mutatis mutandis, in the interpretation of the equivalent provisions of the New South Wales Jury Act. Consequently, any attempt by the author to challenge a decision or the policy of the Sheriff of New South Wales to exclude deaf persons who require Auslan interpretation from performing jury service would also be liable to fail.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee on the Rights of Persons with Disabilities must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Convention.

8.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee and has not been or is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes that the author alleges violations of articles 12, 13, 21 and 29 of the Convention on account of the fact that he, as a deaf person communicating through Auslan, would be denied the right to perform jury duty in New South Wales, should he be randomly selected to do so. The Committee notes the State party's argument that, as the author has never been summoned to perform jury duties, he does not meet the criteria for victim status within the meaning of article 1 (1) of the Optional Protocol to the Convention, which requires that the person be the victim of a violation of the provisions of the Convention. The Committee also notes that the State party does not dispute that the author is qualified and liable to perform jury duty pursuant to section 5 of the Jury Act and that it considers that this does not in itself establish the author's status as the victim of a violation insofar as he has not been involved in any stage of the jury selection process, and has not subsequently been excluded in any way from performing jury duty.

8.4 The Committee further notes the author's submission that, according to the letter of the Director General to the Australian Human Rights Commission dated 3 August 2012, an individual with a hearing impairment summoned to jury duty in New South Wales can use an infrared hearing system to participate in the jury process. The Committee notes that, according to the author, this statement indicates that any form of live assistance, including Auslan interpretation, would be refused should he be summoned to perform jury duties. This could occur at any time, and would result in his being systematically disqualified from jury duty.

8.5 Taking into account the arguments submitted by the parties, the Committee considers that, for a person to claim to be the victim of a violation of a right protected by the Convention, he or she must show either that an act or an omission of the State party concerned has already adversely affected his or her enjoyment of that right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.

8.6 The Committee observes that selection with regard to the performance of jury duties is carried out randomly by means of a process involving several stages, and that the author has not yet been selected. Consequently, the Committee considers that the author has not yet been affected in the enjoyment of his rights. The issue in the present case is therefore whether the author's enjoyment of his rights under the Convention may be considered to be imminently adversely affected. The Committee notes that, under the New South Wales Jury Act, a jury is made up of New South Wales citizens who have been chosen randomly from

the Electoral Roll, and who have received a Notice of Inclusion on the Jury Roll. When a person who has a disability for which some accommodation is required receives a summons to attend jury duty, he or she is asked to contact the Office of the Sheriff. The Office then assesses whether the requested accommodation can be made in the courthouse. Finally, the Committee notes whether a person's eligibility to serve as a juror is a matter for consideration on a case-by-case basis, depending on the particular circumstances of the trial.

8.7 The Committee therefore considers that the author's submission that he may be imminently selected from the Electoral Roll to perform jury duties, which in turn would give rise to the assessment of his ability to perform those duties, as well as the outcome of this assessment, is hypothetical and insufficient for the author to claim victim status within the meaning of article 1 (1) of the Optional Protocol.

8.8 Accordingly, after careful examination of the arguments and materials before it, the Committee finds that the author cannot claim to be a victim within the meaning of article 1 (1) of the Optional Protocol. In the light of this conclusion, the Committee does not find it necessary to examine the other inadmissibility grounds invoked by the State party.

9. The Committee on the Rights of Persons with Disabilities therefore decides:

(a) That the communication is inadmissible under article 1 (1) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.